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No. 85-1280

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

AMERICAN MINING CONGRESS,

Petitioner,

v.

LEE M. THOMAS, ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY
and
ENVIRONMENTAL PROTECTION AGENCY

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

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REPLY BRIEF FOR PETITIONER

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TABLE OF AUTHORITIES

CASES — Page

Train v. Colorado Public Interest Research Group, 426 U.S. 1 (1976) 2, 4

STATUTES

42 U.S.C. § 2202(c)(2) 4

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REPLY BRIEF FOR PETITIONER

Pursuant to Rule 22.5 of this Court's rules, petitioner submits this Reply to the Brief for the Federal Respondents in Opposition.

Respondents have advanced no valid reason for denying the Petition for Writ of Certiorari. To the contrary, their brief, when read in conjunction with the petition, demonstrates that review by this Court is clearly warranted.

Far more significant than what respondents have said in opposition is what they have *not* said:

1. Respondents ignore the fact that UMTRCA was enacted as an amendment to the Atomic Energy Act, under which a comprehensive regulatory scheme has existed since 1946 and under which (since 1970) the division of authority between the Atomic Energy Commission (now NRC) and EPA was well-established, well-known to Congress and observed by the agencies themselves. Petition for Writ of Certiorari at 4-6, 11 n.13 (hereinafter "Pet. at ___").

2. Respondents also fail to acknowledge the statements of principals of EPA and NRC, made prior to UMTRCA's passage, reaffirming the traditional division of authority between the agencies and recognizing that the division of authority would continue under UMTRCA, as the agencies interpreted the proposed legislation. Pet. at 13 and n.18. NRC would, therefore, operate inside the boundaries of mill tailings sites, and EPA outside.

3. Respondents also ignore the agencies' interpretations of UMTRCA made after its passage. In a legal opinion issued in 1981, EPA's General Counsel stated that the traditional division of authority between the two agencies was to be continued under UMTRCA. Pet. at 14 and n.19; Pet. Appendix at 242-245. Moreover, NRC's counsel has represented to the United States Court of Appeals for the Tenth Circuit that the traditional division of authority was maintained under UMTRCA and that EPA's authority was to promulgate general environmental standards consistent with Reorganization Plan No. 3 of 1970. Pet. at 14-15.

4. Moreover, the federal respondents fail to address, or even mention in passing, this Court's decision in *Train v. Colorado Public Interest Research*

Group 426 U.S. 1 (1976), in which EPA had argued—and this Court agreed—that changes in the pervasive regulatory scheme created by Congress under the Atomic Energy Act were not to be lightly inferred. Pet. 16-17.

5. Finally, respondents do not dispute that EPA's interpretation of its authority as affirmed in the decision below has led to a conflict between the agency and NRC that may keep the UMTRCA program in turmoil for years. Pet. at 18-19.

Nowhere throughout the entire course of these proceedings have the federal respondents addressed or explained any of the foregoing items. The court below did not address them either. Respondents' brief continues this void. Respondents rely instead on the "plain language" of the statute and simplistically contend that, since the words "outside the boundaries" nowhere appear in the statutory language, EPA was justified in inferring a congressional intent to change the preexisting regulatory scheme under the Atomic Energy Act, and was therefore justified in determining that it had the power to regulate within the boundaries of mill tailings sites. Respondents argue that their position is correct and that petitioner is "unable to point to any language in the statute that supports its construction [of UMTRCA]."

Respondents' argument lacks both candor and substance. Petitioner has pointed precisely to the language in the statute upon which it relies to support its construction of UMTRCA. It is the same language adopted by Congress in Reorganization Plan No. 3 of 1970 by which the division of authority between EPA and AEC (now NRC) was created. And as the applicable case law demonstrates, by using the same or

substantially similar language in the amendments to the Atomic Energy Act contained in UMTRCA, and without a clear expression of an intent to change the meaning of the language, Congress intended the same meaning. Pet. at 11-12 and n.14. Indeed, the "plain meaning" of the statutory language in UMTRCA and every portion of its legislative history that addresses the issue specifically refutes the *post hoc* rationalizations developed by respondents in this case to support EPA's regulatory program.

Especially in light of the principles recognized in the decision of this Court on a related issue in *Train v. Colorado Public Interest Research Group, supra*, the instant case presents an important question of federal law with significant consequences that requires resolution by this Court.[1]

[1] This question can only be resolved by the Court's granting the petition for writ of certiorari in this case. A conflict between circuits on the question here presented is impossible because judicial review of EPA's regulations has not been, and cannot now be sought in any other Court of Appeals. *See* 42 U.S.C. § 2202(c)(2).

CONCLUSION

For these reasons the petition for writ of certiorari should be granted.

Respectfully submitted,

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